FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 14 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, deceased, *Petitioner*,

vs.

JOHN M. TAYLOR and GEORGE H. ANDERSON, individually, and trading as TAYLOR & ANDERSON TOWING & LIGHTERAGE COMPANY and BALTIMORE & OHIO RAILROAD COMPANY; JOHN M. TAYLOR, GEORGE H. ANDERSON, and SAMUEL B. FORTENBAUGH, JR., *Respondents*.

RESPONDENTS' SUPPLEMENTAL MEMORANDUM AFTER ARGUMENT.

SAMUEL B. FORTENBAUGH, JR.,
BENJAMIN F. STAHL, JR.,
Philadelphia, Penna.,

WILLIAM RADNER,
Washington, D. C.,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, deceased, *Petitioner*,

vs.

JOHN M. TAYLOR and GEORGE H. ANDERSON, individually, and trading as TAYLOR & ANDERSON TOWING & LIGHTERAGE COMPANY and BALTIMORE & OHIO RAILROAD COMPANY; JOHN M. TAYLOR, GEORGE H. ANDERSON, and SAMUEL B. FORTENBAUGH, JR., *Respondents*.

RESPONDENTS' SUPPLEMENTAL MEMORANDUM AFTER ARGUMENT.

At the argument in this case, we advanced the contention that Rules 26, 33, and 34 of the Federal Rules of Civil Procedure were not intended to apply to evidence developed by lawyers in the preparation of cases through interviews with witnesses, whether in the form of writing or recollection. In support of this contention, reference was made to a statement by Mr. Sunderland, noted on page 13 of the brief filed on behalf of the Maritime Law Association to the effect

that the rules with respect to depositions and discovery were intended by the Committee to follow a successful precedent operating in some of the State or British courts. Reference having been made to the absence of any precedent in any American or British court sanctioning the application of discovery and inspection to the circumstances of this case, counsel secured leave of the Court to submit a brief communication setting forth the authorities to which reference had been made.

With respect to the British authorities, the Court is respectfully referred to the supplemental brief filed on behalf of the American Bar Association and to the following quotation from Odgers, *Pleading and Practice* (8th Ed. 1918) p. 285:

> "4. Documents prepared with a view to Litigation—*All documents which are called into existence for the purpose of assisting the deponent or his legal advisers in any actual or anticipated litigation are privileged from production.* (Birmingham, &c., Motor Omnibus Co. v. L. & N. W. Ry., (1913) 3 K. B. 850; Adam Steamship Co. v. London Assurance Corporation, (1914) 3 K.B. 1256.) * * * So are all papers prepared by any agent of the party for the use of his solicitor for the purposes of the action, provided such action be then commenced, or at least imminent. M'Corquodale v. Bell, 1 C.P.D. 471; Southwark and Vauxhall Water Co. v. Quick, 3 Q.B.D. 315.)" [Italics ours]

With respect to the American state and federal decisions, reference is made to the following, supporting the position advanced by us at the argument:

Davenport Co. v. *Pennsylvania R. Co.*, 166 Pa. 480, 31 Atl. 245 (1895).

Cully v. *Northern Pacific Ry. Co.*, 35 Wash. 241, 77 Pac. 202 (1904).

McNamara v. *New York State Rys.*, 129 Misc. 130, 220 N. Y. Supp. 522 (Sup. Ct. 1927).

State ex rel. Mo. Pac. R. Co. v. *Hall*, 325 Mo. 102, 27 S. W. (2d) 1027 (1930).

New York Casualty Co. v. *Superior Court*, 30 Cal. App. (2d) 130, 85 P. (2d) 965 (1938), hearing denied by Calif. Sup. Ct. 1939.
Armstrong v. *Portland Ry. Co.*, 52 Ore. 437, 97 Pac. 715 (1908).
Ex Parte Schoepf, 74 Ohio St. 1, 77 N. E. 276 (1906).
Lehan v. *Chic. & N. W. Ry. Co.*, 169 Wis. 408, 172 N. W. 787 (1919).
Atlantic Coast Line R. Co. v. *Williams*, 21 Ga. App. 453, 94 S. E. 584 (1917).
The Princess Sophia, 269 Fed. 651 (W. D. Wash. 1920).
The President Polk, 37 F. (2d) 102 (E. D. N. Y. 1929).

In all of these decisions the material sought to be obtained was prepared by persons other than counsel. *A fortiori*, a similar result would seem to be required in cases where counsel had developed the matters requested.

To be distinguished are various cases where material was held a proper subject of discovery or inspection either on the ground that it was made "in the regular course of business" by persons other than attorneys or before litigation had actually developed or been threatened [*Virginia-Carolina Chemical Co.* v. *Knight*, 106 Va. 675, 56 S. E. 725 (1907)], or where the material was merely a photograph, as distinguished from verbal communications [*LaCoss* v. *Town of Lebanon*, 78 N. H. 413, 101 Atl. 364 (1917)].

Certain of the above decisions cited in support of our position use the word "privilege" to defend the immunity of statements of witnesses made in anticipation of trial. The decisions in other cases are grounded on other reasons. The purpose of the citations is to show that the American law (apart from the Federal Rules of Civil Procedure) apparently is the same as the British rule and denies the availability of this information to counsel for the opposite side in litigation, at least before the actual trial of the case. The cited authorities also support our contention that the Federal Rules of Civil Procedure should receive the same interpretation as the British rules relating to dis-

covery and inspection, which, notwithstanding their broad and general language, have not been applied to situations such as those presented in this case. (See references to British authorities above noted.)

In this connection reference is again made to the specific provisions of Section 26 (b) of the Rules providing for the disclosure of names and addresses of witnesses and to the absence of any specific requirements for the disclosure of their statements; and to the rule of statutory construction adopted by this Court in the parallel case of *Thompson* v. *Thompson*, 218 U. S. 611 (1910), referred to upon the argument.

Respectfully submitted,

SAMUEL B. FORTENBAUGH, JR.,
BENJAMIN F. STAHL, JR.,
Philadelphia, Penna.,

WILLIAM RADNER,
Washington, D. C.,
Counsel for Respondents.

November 14, 1946.